

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION**

Damiene Boles,

Case No. 3:12CV225

Plaintiff

v.

ORDER

Warden, Toledo Correctional Institute,

Defendant

This is a habeas corpus case in which the Magistrate Judge has filed a Report and Recommendation recommending the petition be denied. (Doc. 13). Petitioner has filed objections to the Report and Recommendation. (Doc. 18).

The Magistrate Judge's Report states that petitioner's grounds one through eight and ten through twelve were procedurally defaulted, and grounds seven, nine, and thirteen are without merit. In addition, the Magistrate Judge, stated the defaulted first and third grounds likewise were without merit.

On *de novo* review, I find the Report and Recommendation well taken and accordingly overrule the objections and dismiss the petition.

First: the findings of procedural default are correct. Petitioner's state court appeal did not rely on federal constitutional grounds with regard to habeas grounds one and two (challenging admission of hearsay testimony). With regard to ground three (opinion testimony), petitioner, as the Report and Recommendation notes, made only a "passing reference to his Sixth and

Fourteenth Amendment rights” (Doc. 13, at 22) and he failed to cite federal case law in the state appellate court. That court did not undertake federal constitutional analysis as to the claims now in grounds one through three.

With regard to grounds four (prosecutorial misconduct in rebuttal argument) and five (erroneous jury instruction), petitioner’s trial court counsel did not object. Petitioner has not shown cause for or prejudice from these contentions.

I also agree with the Magistrate Judge that grounds six (coronor’s testimony), eleven (witness testimony), and twelve (jurors’ failure to read the handbook) were not fairly presented to the state appellate court. Likewise, petitioner did not fairly present grounds four (prosecutorial misconduct), eight (cumulative error), and ten (manifest weight of the evidence) in the Ohio Supreme Court.

That leaves only grounds seven (cross-examination), nine (sufficiency of the evidence), and thirteen (ineffective assistance of counsel) subject to habeas merits review.¹

Ground seven alleges the trial court improperly inhibited cross-examination of a state’s witness. After one witness denied having been drinking or having taken anything that would “have made it difficult for [him] to see anything,” counsel asked another witness whether the first witness had a drug habit. The trial court sustained the prosecutor’s objection to that question.

The state courts held that the ruling was correct as a matter of state evidentiary law. The Magistrate Judge concluded that, as a matter of federal constitutional law, the trial court had not

¹ As noted, the Magistrate Judge, in an abundance of caution, also reviewed the merits of the first three grounds. Having found his default analysis correct, I have nonetheless reviewed his merits assessment as to those grounds and find it well-taken.

improperly curtailed examination. I agree: at most, this was an effort to impeach the first witness on a collateral matter – drug use. No error occurred, much less error of a constitutional sort.

Ground nine claims the verdict was against the manifest weight of the evidence. The Magistrate Judge found, and I concur, that the state appellate court applied the proper standard of review and reached an appropriate conclusion on this issue. Having also reviewed the evidence against petitioner, I find that ample evidence supports the jury's verdict.

Finally, there is likewise no merit to petitioner's challenge to the constitutional effectiveness of his attorney's performance.

In light of the foregoing, it is hereby

ORDERED THAT:

1. Petitioner's objections to the Magistrate Judge's Report and Recommendation be, and the same hereby are, overruled;
2. The Magistrate Judge's Report and Recommendation be, and the same hereby is, adopted as the order of this court; and
3. The petition be, and the same hereby is, denied and dismissed.

So ordered.

/s/ James G.Carr
Sr. U.S. District Judge